UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF,	:	
NISTEL, INC.,	:	
Respondent,	:	Case No. 03-RD-130926
AND	:	
LISA LYDECKER,	:	
Petitioner,	:	
AND	:	
NEW YORK STATE NURSES ASSOCIATION,	:	
Union.	:	

NISTEL INC.'S STATEMENT IN OPPOSITION TO NEW YORK STATE NURSES ASSOCIATION'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S SECOND SUPPLEMENTAL DECISION TO OPEN AND COUNT THE IMPOUNDED BALLOTS

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. THE UNION FAILED TO FILE A TIMELY REQUEST FOR REVIEW FROM THE REGIONAL DIRECTOR'S FINDINGS AND RULINGS CONTAINED IN THE SUPPLEMENTAL DECISION DATED DECEMBER 23, 2014 2

II. THE FEBRUARY 20, 2015 HEARING PRODUCED NO EVIDENCE DEMONSTRATING THAT THE CESSATION OF THE EMPLOYER'S OPERATIONS IS IMMINENT OR CERTAIN 5

III. THE REGIONAL DIRECTOR'S CONCLUSIONS AND FINDINGS DO NOT REQUIRE AN IMMEDIATE OPENING OF IMPOUNDED BALLOTS, AND THE UNION'S THIRD ARGUMENT REGARDING THAT ISSUE REPRESENTS A MISREADING OF THE SECOND SUPPLEMENTAL DECISION 6

CONCLUSION 7

INTRODUCTION

Pursuant to Section 102.67(e) of the Board's Rules and Regulations, Nistel, Inc. ("Nistel" or "Employer") submits this Statement in Opposition to the New York State Nurses Association's ("NYSNA" or "Union") Request for Review of the Regional Director's Second Supplemental Decision to Open and Count the Impounded Ballots, dated March 12, 2015 (the "Second Supplemental Decision"). Nistel contends that no compelling reasons exist to grant NYSNA's Request for Review.

First, the Union seeks in its Request for Review to challenge factual findings and legal rulings made by the Regional Director in her December 23, 2014 Supplemental Decision to Open and Count the Impounded Ballots (the "Supplemental Decision," attached hereto as Exhibit A). Having failed to file a timely Request for Review from the Supplemental Decision, the Union is bound by the factual findings and legal rulings issued therein.

Second, to the limited extent that Union's Request for Review concerns factual issues made part of the record at the third day of hearing in this matter (February 20, 2015), there is no basis for the Union's claim that the Regional Director's key factual finding was clearly erroneous; specifically, her finding that the additional evidence introduced at the February 20, 2015 hearing was insufficient to establish that the Employer's cessation of business was imminent or certain.

ARGUMENT

I. THE UNION FAILED TO FILE A TIMELY REQUEST FOR REVIEW FROM THE REGIONAL DIRECTOR'S FINDINGS AND RULINGS CONTAINED IN THE SUPPLEMENTAL DECISION DATED DECEMBER 23, 2014

The first two days of hearing in this matter took place on September 19, 2014 and December 8, 2014. On December 23, 2014, the Regional Director issued her Supplemental Decision to Open and Count the Impounded Ballots. (Exhibit A). The Regional Director's Supplemental Decision addressed all evidence and legal arguments presented by the parties during the first two days of hearing. The Supplemental Decision provided that any request for review had to be filed by January 6, 2015. Neither Nistel nor the Union filed a request for review. Subsequently, by letter dated January 13, 2015 (attached hereto as Exhibit B), the Union requested that the record in the case be reopened "for the purposes of holding a hearing as to the status of HealthAlliance's affiliation with Westchester Medical Center and Nistel's continued status." (Exhibit B, p. 2).

On January 16, 2015, the Regional Director responded to the Union's letter with an Order to Show Cause (attached hereto as Exhibit C). In her Order to Show Cause the Regional Director specifically noted that "[T]he Union did not file a request for review of my decision." (Exhibit C, p. 1). However, the Regional Director requested that the parties submit written positions on whether "extraordinary circumstances" existed to reopen the record pursuant to the Union's request. Following written submissions by the parties, by Order dated February 6, 2015 the Regional Director issued an Order Scheduling Hearing. (Attached hereto as Exhibit D). The second paragraph of that Order reads as follows:

> I have determined that the hearing be reopened for the limited purpose of taking additional testimony and evidence on the issue of whether the Employer now has imminent and certain plans to cease its operations as a result of the announcement, after the remand hearing closed and Supplemental Decision issued, that

> HealthAlliance, the Employer's sole customer, and Westchester Medical Center are engaged in merger discussions.

Pursuant to the Regional Director's Order, a hearing was held on February 20, 2015. On March 12, 2015, the Regional Director issued her Second Supplemental Decision to Open and Count the Impounded Ballots. In that Decision the Regional Director reiterated that the third hearing was limited to taking additional evidence concerning the HealthAlliance/ Westchester Medical Center merger discussions. She then stated "accordingly, I will address the parties' arguments solely as they relate to the new evidence obtained in the February 20, 2015 hearing. (Second Supplemental Decision, p. 6). And, based on her review of the record evidence from the February 20, 2015 hearing, the Regional Director reaffirmed her previous finding that "the Union's assertion that the Employer will cease operations is too speculative to bar an election." (Second Supplemental Decision, p. 12).

The Union now requests review of the Second Supplemental Decision. However, and contrary to the limited scope of the Second Supplemental Decision, the Union in its request for review improperly presents to the Board factual issues and legal conclusions fully addressed and resolved by the Regional Director in her prior Supplemental Decision of December 23, 2014, from which the Union did not request review.

In particular, the Union in its request for review presents as a "compelling reason" for granting its request the following issue:

> The circumstances of this case raise a substantial question of law regarding the processing of a petition when an Employer is poised to cease operations and whether an Employer subverts the Act when it temporarily postpones a closing simply so that a decertification vote can occur. (Union Request for Review, p. 1).

But it was precisely this issue which the Regional Director addressed and resolved against the Union's position in the Supplemental Decision of December 23, 2014. After reviewing the record evidence and applicable NLRB law on this issue, the Regional Director ruled as follows:

> While it is clear that the Employer would not have remained opened absent the filing of the petition, under current Board law and in the absence of evidence of imminent closure, there is no justification to dismiss the petition solely on this basis. Therefore, I deny the Union's motion to dismiss the petition on this ground. (Supplemental Decision, p. 8).

Had the Union disagreed with the Regional Director's ruling on this question of law, it had a full opportunity to present its disagreement to the Board on a request for review. Having failed to file a timely request for review of the Regional Director's December 23, 2014 Supplemental Decision, it should not be permitted at this juncture to challenge the Regional Director's prior ruling.

Similarly, the Union in its request for review now asks the Board to consider all of the evidence produced at three days of hearing with respect to its claim that the Regional Director made factual findings which were clearly erroneous. However, the only factual issues which are properly before the Board for review at this time are the additional facts made part of the record at the February 20, 2015 hearing. Factual findings concerning Nistel's imminent and certain closure made by the Regional Director in the Supplemental Decision of December 23, 2014 could have been challenged by the Union by means of a request for review at that time. Again, having failed file a timely request for review of the December 23, 2014 Supplemental Decision, the Union should not be permitted to challenge those factual findings in the instant request for review.

II. THE FEBRUARY 20, 2015 HEARING PRODUCED NO EVIDENCE DEMONSTRATING THAT THE CESSATION OF THE EMPLOYER'S OPERATIONS IS IMMINENT OR CERTAIN

As discussed above, the Regional Director's February 6, 2015 Order reopening the record was " ... for the limited purpose of taking additional testimony and evidence on the issue of whether the Employer now has imminent and certain plans to cease its operations as a result of the announcement, after the remand hearing closed and the Supplemental Decision issued, that HealthAlliance, the Employers sole customer, and Westchester Medical Center are engaged in merger discussions." (Exhibit D).

In her Second Supplemental Decision the Regional Director noted that none of the documentary evidence produced and admitted into evidence at the February 20th hearing, including the HealthAlliance ("HA") Board minutes and the December 22, 2014 Letter of Intent between HA and Westchester Medical Center ("WMC") referred to Nistel at all. (Second Supplemental Decision, pp. 6 – 7). The affidavit of WMC's Vice President of Human Resources Jordy Rabinowitz states that WMC was unaware of any relationship between HA and Nistel until he received the Union's February 9, 2015 subpoena. He further states in his affidavit that WMC holds no view as to whether Nistel would be affected post-affiliation. (Second Supplemental Decision, pp. 7 – 8).

The only witness called by the Union, HA's Chief Operating Officer Joseph Marsicovete, testified, *inter alia*, that in spite of the anticipated affiliation between HA and WMC, the contractual arrangement with Nistel and Nistel's decision to remain open for the indefinite future remains unchanged. (Second Supplemental Decision, p. 8). Marsicovete testified that the process of affiliating and getting approval for such affiliation could take a year or more. Perhaps the most telling was Marsicovete's testimony that keeping Nistel open is a good business decision both because of possible increased surgical volume (*see*, Second Supplemental

Decision, pp. 8 – 9), in addition to the original decision to keep Nistel open in order to avoid employee discontent.

The Union argues that the HA and Nistel statements subsequent to the June 20, 2014 rescission of the WARN notices and continuing to date that Nistel would remain open for the foreseeable future should be ignored since they are "bare" statement without proof. Yet the Regional Director found that "[t]he evidence discloses that the subsequent actions of the Employer and HealthAlliance are consistent with the Employer's plan to remain open for the foreseeable future. ...[N]o date certain for cessation of operations has been announced to the employees, the Union or the HealthAlliance board of directors. Eight months later, all of the unit employees remain employed by the Employer. *See Walker County Hosiery Mills...*" [Citation omitted]. (Second Supplemental Decision, p. 11)

In point of fact the record evidence from the February 20, 2015 hearing is devoid of any evidence that indicates there is an imminent and certain plan to close Nistel. The Union relies upon inferences and assumptions not supported by anything in the record. The Regional Director's Second Supplemental Decision is based upon the record and does not contain any decisions on substantial factual issues that are clearly erroneous. As such, the Board should deny the Union's request for review.

III. THE REGIONAL DIRECTOR'S CONCLUSIONS AND FINDINGS DO NOT REQUIRE AN IMMEDIATE OPENING OF IMPOUNDED BALLOTS, AND THE UNION'S THIRD ARGUMENT REGARDING THAT ISSUE REPRESENTS A MISREADING OF THE SECOND SUPPLEMENTAL DECISION

The Regional Director's Second Supplemental Decision concludes by stating "that the impounded ballots should be opened and counted at the time and place to be designated by the Region." (Second Supplemental Decision, p. 13) It is presumed that the Region will follow Section 11732 of the Casehandling Manual, stating that ballots will remain impounded pending a

ruling from the Office of Appeals on the Union's Type II ULP charges which are currently on appeal.

CONCLUSION

For all of the foregoing reasons, the Board should deny the Union's request for review.

Dated: April 2, 2015
New York, New York

Respectfully submitted,

CLIFTON BUDD & DeMARIA, LLP

By: _____

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CERTIFICATE OF SERVICE

I, Eric S. Lamm, certify that on this 2nd day of April 2015, this NISTEL, INC.'S STATEMENT IN OPPOSITION was served by electronic mail upon:

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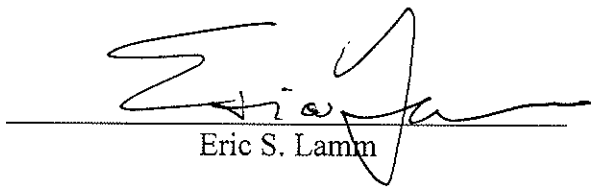

Eric S. Lamm

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION THREE

NISTEL, INC.

Employer

and

LISA LYDECKER Case 3-RD-130926

Petitioner

and

NEW YORK STATE NURSES ASSOCIATION

Union

SUPPLEMENTAL DECISION TO OPEN AND COUNT THE IMPOUNDED BALLOTS

On June 17, 2014, [1] Petitioner filed the petition in this matter seeking an election to determine whether approximately 44 registered nurses employed by Nistel, Inc. ("Employer") want to decertify the Union as their collective-bargaining representative. A hearing was conducted on September 19, to address whether cessation of the Employer's operations is definite, imminent or on a date certain, thereby precluding a question concerning representation. On October 17, the Acting Regional Director for Region Three issued a Decision and Direction of Election finding that the evidence was too speculative to conclude that the Employer's

[1] All dates are in 2014 unless otherwise noted.

cessation of business is imminent or sufficiently certain. The Acting Regional Director further concluded that a question concerning representation existed and directed an election.

Thereafter, the Union filed a request for review, and on November 20, the National Labor Relations Board ("Board"), issued an Order finding that the Acting Regional Director erred by affirming the hearing officer's grant of the Employer's petition to revoke the Union's subpoena duces tecum "only to the extent that the Union seeks documentation pertaining to whether and to what extent the Employer had – or presently has – imminent and certain plans to shut down its business, or to continue its operations into 2015 and beyond."[2] The Board remanded this proceeding to the Regional Director for further appropriate action and denied the Union's request for a stay of the election.

Therefore, on November 20, the Region conducted a secret ballot election among the Employer's registered nurses in the bargaining unit and impounded the ballots pending final resolution of the existence of a question concerning representation. On December 8, a supplemental hearing was held in which subpoenaed documents were admitted into the record. In addition, Joseph Marsicovete the Chief Operating Officer ("COO") of HealthAlliance of Hudson Valley ("HealthAlliance") testified. The record discloses that the Employer produced numerous documents responsive to the Union's subpoena duces tecum at the hearing. There was no dispute with respect to the production and review of those documents.

Based on the evidentiary record and the applicable Board law, I find that the record evidence does not demonstrate that cessation of the Employer's operations is definite, imminent or on a date certain and does not warrant a change to the Acting Regional Director's prior

[2] The Board left resolution of the Employer's unresolved defenses contained in its petition to revoke to the Regional Director. The Employer raised three defenses, two of which were withdrawn at the September 19th hearing. The Employer's remaining defense, that the Union is abusing Board processes by serving the subpoena duces tecum thereby causing delay and attempting to relitigate the unfair labor practice charges, is now moot inasmuch as the Board has directed production of the documents relative to the Employer's past, current and future plans to operate.

conclusion that a question concerning representation exists. Accordingly, I direct that the impounded ballots be opened and counted.

Board Case Law

The Board will not conduct an election where the employer's cessation of operations is imminent and certain. *Hughes Aircraft Co.*, 308 NLRB 82 (1992); *Martin Marietta Aluminum, Inc.*, 214 NLRB 646 (1974). It serves no useful purpose to direct an election when an employer's operations are set to terminate within two months of the date of the representation hearing. *Hughes Aircraft Co.*, supra; *Larson Plywood Company*, 223 NLRB 1161 (1976); *General Motors Corporation*, 88 NLRB 119 (1950).

In determining whether the cessation of operations is sufficiently imminent and certain to warrant dismissal of the petition, the Board considers factors such as the period of time between the representation hearing and the expected date of cessation, steps taken by the employer to cease operations, and whether the employees have been notified. See *Hughes Aircraft Co.*, supra; *Davey McKee Corp.*, 308 NLRB 839, 840 (1992). Mere speculation as to the uncertainty of future operations is not sufficient to dismiss the petition. *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997); *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976).

In *Gibson Electric, Inc.*, 226 NLRB 1063 (1976) the Board, on review, directed an election be held after the Regional Director dismissed the petition finding that the employer's operations were going to cease on a date certain. The Board found that the employer continued to operate "in full force" since the issuance of the Director's decision and that a substantial portion of the workforce would be employed long enough into the future to warrant an election. At the time the Board decision issued, there was at least four months of work remaining.

Facts

As noted previously, the Union is the collective bargaining representative for approximately 44 registered nurses who work for the Employer. The Employer provides surgical services pursuant to two service contracts to Kingston Hospital and Benedictine Hospital, both of which are operated by HealthAlliance. The most recent service contracts between the Employer and HealthAlliance are effective January 30, 2014 through January 29, 2016. Both contracts provide that HealthAlliance may terminate the contract without cause with 30 days notice to the Employer.

For the past several years, HealthAlliance has been in the process of consolidating the Benedictine and Kingston Hospitals into one campus. In 2013, HealthAlliance announced that due to financial difficulties, it needed to affiliate with a larger, fiscally-sound institution.[3] COO Marsicovete testified that in early 2014, to cut costs, HealthAlliance decided to end its contract with the Employer and hire the registered nurses directly. The decision, according to Marsicovete was based upon an estimated cost savings of $125,000. Marsicovete also testified that the reason for which the Employer was created no longer existed, and it was no longer necessary to keep the surgical department separate from HealthAlliance.[4]

The record discloses that HealthAlliance gave no formal notice to the Employer of its intent to terminate the service contracts. Rather, Marsicovete testified that there were oral discussions about closing Nistel and that the Employer's president approved.

---

[3] Marsicovete testified that as of the December 8 hearing, there is no official partnership with any other institution but discussions are ongoing.

[4] The record reveals that the Employer was created to keep abortion services separate from Benedictine Hospital which was managed by an unknown Catholic affiliate. By the end of 2013, the Catholic affiliate no longer managed the hospital.

HealthAlliance assisted the Employer with preparation of the 90-day WARN notices and researched the proper legal procedures for eliminating the Employer's pension plan.

As more fully set forth in the October 17 Decision of the Acting Regional Director, the record evidence discloses that on April 17, the Employer issued WARN notices.

Additional evidence from the December 8 hearing discloses that, consistent with the Employer's decision to close, on April 25, at the HealthAlliance Board of Director's meeting, the president's report included an update regarding the Employer's closure. The report stated that HealthAlliance was continuing to negotiate with the Union regarding the return of the operating room services performed by the Employer to the two HealthAlliance campuses, and that a 90-day closing process existed which should be completed by mid-summer.[5] HealthAlliance began working with managers, pension consultants and attorneys to assist the Employer with terminating its retirement plan.

The decertification petition was filed on June 17, 2014. Marsicovete testified that after the petition was filed, he initiated and was involved in HealthAlliance's decision to continue its contracts with the Employer. Marsicovete learned from the Employer's director of surgical services that it was becoming increasingly difficult to manage the staff because employees were upset about not being given the opportunity to vote in an election as to whether they wanted to remain represented by the Union. Marsicovete testified that in order to calm the situation, HealthAlliance management decided it would continue its relationship with the Employer and that the WARN notices should be

[5] Marsicovete testified that but for the 90-day WARN notices, the Employer would probably have closed prior to July 25.

rescinded. He further testified that the projected savings[6] from closing the Employer was not worth the cost of the employee discontent and that he wanted the employees to have the election. The Employer's president was notified and agreed with HealthAlliance's decision to maintain the contractual relationship and, as a result, the Employer rescinded the WARN notices on June 24. HealthAlliance gave no formal notice to the Employer of its decision to continue the contractual relationship.

On June 27, at a HealthAlliance Board of Director's meeting, Marsicovete distributed an informational handout[7] which explained the reasons for keeping the Employer's facility open. The purpose of the handout was to assist board members in making statements to or responding to questions from the community. The handout states that, "It appeared to the management of both Nistel and of HealthAlliance that the registered nurses were extremely upset by indications that the National Labor Relations Board was going to dismiss their petition because of the fact that Nistel was planning on closing within the next two months. Both managements – Nistel and Health Alliance – believed that the nurses should be allowed to democratically express their choice." The handout further states, "Since the actions taken towards closing Nistel and transferring the nurses to employment by HealthAlliance were not irreversible, Nistel determined it would be in the best business interest of all parties to remain open for the foreseeable future under the same leasing arrangement as has been in place for the past six years."

Marsicovete testified that he was not aware that the initial decision to cease HealthAlliance's business relationship with the Employer was related to facilitating

[6] Marsicovete testified that HealthAlliance subsequently realized that the savings were not going to be as significant as he first believed because some of the functions, such as accounting and billing, would be subsumed by HealthAlliance, requiring additional HealthAlliance resources.

[7] The handout was produced at the hearing pursuant to the Union's subpoena duces tecum.

HealthAlliance's ability to find a partner. He testified that there were no discussions with potential partners regarding closing the Employer's facility in the future; however, potential partners are aware that the Employer was going to close and then reversed its decision. Marsicovete further testified that the current plan is to continue its contractual relationship with the Employer "far into the future" to avoid upsetting the nurses by changing direction a third time.

The record reveals that the Employer continued working on terminating its pension plan through July and early August. Marsicovete testified that while he did not understand why individuals continued those efforts after the Employer decided to continue in business, the process was stopped and that by the fall, the pension plan was reinstated.

Application of Board Law to this Case

In reaching the conclusion that the additional record evidence is insufficient to alter the Region's original decision that the closure of the Employer's operations is sufficiently imminent, I rely on the following record evidence and analysis.

It is clear from the record evidence that the Employer rescinded the WARN notices and remained in business to allow the RNs an opportunity to vote. The Union asserts that the petition should be dismissed because of the Employer's imminent cessation of operations and its attempts to "subvert the Act" by delaying its closure just long enough and for the sole purpose of allowing the decertification vote to proceed. The Union, however, cites no case authority supporting this assertion. As noted in the Acting Regional Director's original decision, there is no evidence that the Petitioner was

"fronting for the Employer" by filing the petition in contemplation of evading the Act.[8] See *Walker County Hosiery Mills*, 91 NLRB 8 (1950). While it is clear that the Employer would not have remained open absent the filing of the petition, under current Board law and in the absence of evidence of imminent closure, there is no justification to dismiss the petition solely on this basis. Therefore, I deny the Union's motion to dismiss the petition on this ground.

The Union argues in its brief that the record negates a finding that the Employer will continue operations much beyond the start of 2015, and that the Employer's uncorroborated statements that it intends to remain in operation for the foreseeable future should not be relied upon. The record however, discloses more than uncorroborated statements that the Employer intends to remain open for the foreseeable future. The evidence discloses that the subsequent actions of the Employer and HealthAlliance are consistent with the Employer's plan to remain open for the foreseeable future. Specifically, the Employer rescinded the WARN notices and no date certain for cessation of operations has been announced to the employees, the Union, or the HealthAlliance board of directors. All of the unit employees remain employed by the Employer, and the parties have met for successor contract negotiations. See *Walker County Hosiery Mills*, 91 NLRB 8 (1950) (Board ordered an election be held because the employer had resumed operations, recalled laid-off employees and stockholders had rescinded the resolution to dissolve the corporation.); *Gibson Electric, Inc.*, 226 NLRB 1063 (1976) (Board directed

[8] I find that the hearing officer properly precluded testimony regarding Employer support of the decertification petition. The Board does not allow the litigation of the issue of employer instigation of, or assistance in, the filing of a decertification petition in representation proceedings. *Union Mfg. Co.*, 123 NLRB 1633 (1959). An exception to the Board's finding in *Union Mfg. Co.*, is when the petitioner is an alleged supervisor. *Modern Hard Chrome Service Co.*, 124 NLRB 1235 (1959). There is no claim here that the Petitioner is an alleged supervisor.

an election because the employer's initial job completion date was inaccurate, there was no date certain for closure, and the full complement of employees continued to be employed by the employer.) There is no documentary evidence or testimony that indicates the Employer still intends to close, let alone on a particular date. To the contrary, HealthAlliance's COO Marsicovete testified that HealthAlliance does not want to prolong employee discontent by changing direction regarding the closing a third time and that HealthAlliance has not discussed any details with potential partners regarding closing the Employer in the future. Compare *Larson Plywood Company*, 223 NLRB 1161 (1976) (Board dismissed the petition where a corporate resolution was passed to sell company assets in 90 days, there was no evidence of inconsistent action on the part of the employer, and no evidence that an employment relationship would survive the liquidation).

The only record evidence that suggests that the Employer will cease operations in the foreseeable future is that Employer continued to take steps to terminate its pension plan for a month and a half after HealthAlliance changed course and approached it about adhering to the existing service contract. Marsicovete testified, however, that this activity ceased in the fall and the pension plan continues to exist. Based on the foregoing and the record evidence overall, I find that the Union's assertion that the Employer will cease operations is too speculative to bar an election. *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976).

Finally, the Union also argues in its brief that it "serves no useful purpose" to complete the election process when an employer will cease operations in three to four months. The record reveals insufficient evidence that the Employer will cease operations

in three to four months. In any event, the Employer had already advised the employees that they would transition to HealthAlliance when it initially informed them of the cessation of operations in April and there is no evidence on the record that their fate will change if the Employer eventually closes. In these circumstances a question concerning representation may very well survive if employees transition from the Employer's to HealthAlliance's payroll.[9] Therefore, it would serve a useful purpose to allow the unit employees to determine whether they want union representation at this juncture and it is inappropriate to dismiss the petition.

Conclusion Regarding Cessation of Employer's Operations

In determining that a question concerning representation exists, I find that the evidence is too speculative to conclude that the Employer's cessation of business is imminent or sufficiently certain. No persuasive reason has been established for depriving the bargaining unit employees of their right to an election.

CONCLUSIONS AND FINDINGS

Based upon the entire record,[10] in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

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[9] See *Adelphia Communications Corporation*, 333 NLRB 1154 (2001), where the Board directed an election be held under circumstances where a decertification petition was filed prior to the employees being terminated by TCI and before Adelphia became a successor employer by hiring all of TCI's employees. In that case, therefore, the question concerning representation survived the change in employers.

[10] The Union and Employer filed post-hearing briefs which have been duly considered. The Union's motion to correct the transcript is granted.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. The Employer and the Union's most recent collective-bargaining agreement covering the employees at issue herein was effective from June 1, 2012 through May 31, 2014. As of the date of the hearing, no subsequent collective-bargaining agreement was negotiated.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time and per-diem registered nurses employed by the Employer at Benedictine Hospital, Kingston Hospital, and Foxhall Ambulatory Surgery Center; excluding nurse managers, the clinical coordinator, the OR manager, the ADS PACU manager, PST manager, the director of nursing, guards, and all other professional employees and supervisors as defined in the Act, and all other employees.

There are approximately 44 employees in the bargaining unit found appropriate herein.

7. Inasmuch as an election was conducted and the ballots impounded, I conclude that the impounded ballots should be opened and counted at a time and place to be designated by the Region.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-

0001. This request must be received by the Board in Washington, DC by 5 p.m. EDT **January 6, 2015**. The request may be filed electronically through the Agency's web site, www.nlrb.gov,[11] but may not be filed by facsimile.

DATED at Buffalo, New York this 23rd day of December, 2014.

Rhonda P. Ley

RHONDA P. LEY, Regional Director
National Labor Relations Board - Region 3
Niagara Center Building – Suite 630
130 S. Elmwood Avenue
Buffalo, New York 14202-2465

[11] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.

Exhibit B

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January 13, 2015

Rhonda P. Ley
Regional Director
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Buffalo, New York 14202-2465

Re: Nistel, Inc., Case No. 03-RD-130926

Dear Ms. Ley:

I write on behalf of the New York State Nurses Association.

As you know, the ballots for the election in the above-cited matter have been impounded. As you also know, the Union has two pending appeals regarding the dismissal of unfair labor practice charges. (03-CA-135294, 03-CA-133935). I have been informed by Assistant Regional Director Murphy that, in accordance with Board procedure, the ballots will remain impounded until the appeals are decided.

In light of recent developments, even if the appeals are denied, however, the Region should not open and count the ballots. Specifically, Health Alliance of the Hudson Valley ("HealthAlliance") recently announced that it had signed a letter of intent to affiliate with Westchester Medical Center, pursuant to which Westchester Medical Center would become "the sole corporate member of HealthAlliance" and either Benedictine or Kingston Hospital would close. HealthAlliance's CEO has been quoted as saying the parties are working "as quickly as possible to finalize" the affiliation and that state funding needed to complete the process was expected to be known in April.

All of this calls into question the testimony of a HealthAlliance representative at the hearing in this case on December 8, 2014 that it was HealthAlliance's intent to use Nistel for the foreseeable future so as to avoid any disruption. It seems highly unlikely that the recent discussions that led to letter of intent were not already underway as of December 8. It is not unreasonable to suspect that HealthAlliance was trying to hide from the Region that on December 8, HealthAlliance was actively negotiating an affiliation with Westchester Medical Center that would lead to the closure of either Kingston or Benedictine Hospital, which HealthAlliance conceded would be disruptive *See* Transcript of December 8, 2014 at page 43. After all, the disruption caused by closing one of the two hospitals certainly undermines the articulated reason for Nistel's continuation – to avoid disruption – if a closing is imminent.

Regardless whether HealthAlliance should have disclosed this information on December 8,[1] the transaction with Westchester Medical Center is clearly underway and HealthAlliance intends to act quickly. There is already record evidence that Nistel's continued existence presents problems for completing an affiliation. *See* Transcript of September 19, 2014 at 43-44.[2]

NYSNA asks that before opening any ballots, the Region re-open the record for the purposes of holding a hearing as to the status of HealthAlliance's affiliation with Westchester Medical Center and Nistel's continued status. Any such hearing, however, should await a decision on the appeals.

Thank you.

Very truly yours,

Joseph J. Vitale

Joseph J. Vitale

cc: Howard Estock, Attorney for
the Employer
Lisa Lydecker, Petitioner

[1] HealthAlliance will no doubt argue that as of December 8 it was impossible to predict how its discussions with Westchester Medical Center would progress and/or that those discussions were confidential.

[2] On December 8, HealthAlliance's witness explained that since HealthAlliance has "not yet officially partnered with anyone," all discussions with possible affilates have been at the "20,000 foot level" without "delv[ing] into . . . the nuts and bolts" such as the savings to be realized through closing Nistel. *See* Transcript of December 8, 2014 at page 49. With the letter of intent now signed, Westchester Medical Center is no doubt delving into the issue of terminating the use of Nistel.

Exhibit C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

NISTEL, INC.

Employer

and **Case 03-RD-130926**

LISA LYDECKER

Petitioner

and

NEW YORK STATE NURSES ASSOCIATION

Union

ORDER TO SHOW CAUSE

On October 17, 2014, the Acting Regional Director issued a Decision and Direction of Election in the above captioned matter after concluding that the petition raised a question concerning representation election as the Employer's closure was not imminent. The Union filed a request for review and on November 20, 2014, the Board remanded the case for the limited purpose of receiving documents and testimony regarding the information requested by the Union's subpoena pertaining to whether and to what extent the Employer had, or presently has, imminent and certain plans to shut its business. The Board did not issue a stay of the election so the election was conducted on November 20, 2014, as scheduled and the ballots were impounded.

The remand hearing was conducted on December 8, 2014. On December 23, 2014, I issued a Supplemental Decision to Open and Count the Impounded Ballots after concluding that the record evidence did not demonstrate the cessation of the Employer's operations was imminent. The Union did not file a request for review of my decision. However, by letter dated January 13, 2015, the Union requested that the hearing be reopened for the purpose of taking additional testimony and evidence on the issue of whether the Employer now has imminent and certain plans to cease its operations as a result of the announcement, after the remand hearing closed and the Supplemental Decision issued, that Health Alliance, the Employer's sole customer, and Westchester Medical Center intend to merge.[1]

Section 102.65(e) of the Rules and Regulations provides that a party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for a reopening of the record. Accordingly,

[1] The Union's letter is appended as Ex. 1.

IT IS HEREBY ORDERED that any party hereto provide written cause of its legal position and argument as to whether such extraordinary circumstances exist as to warrant re-opening of the record as requested by the Union. Any submission should also include an offer of proof as to what evidence would be proffered at a reopened hearing and must be received in this office by the close of business on January 30, 2015, with a copy to the other parties being simultaneously served. (See attached Service Sheet).

Dated at Albany, New York this 16th day of January 2015.

RHONDA P. LEY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

COHEN WEISS SIMON LLP

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January 13, 2015

Rhonda P. Ley
Regional Director
National Labor Relations Board, Region 3
130 South Elmwood Avenue, Suite 630
Buffalo, New York 14202-2465

Re: Nistel, Inc., Case No. 03-RD-130926

Dear Ms. Ley:

I write on behalf of the New York State Nurses Association.

As you know, the ballots for the election in the above-cited matter have been impounded. As you also know, the Union has two pending appeals regarding the dismissal of unfair labor practice charges. (03-CA-135294, 03-CA-133935). I have been informed by Assistant Regional Director Murphy that, in accordance with Board procedure, the ballots will remain impounded until the appeals are decided.

In light of recent developments, even if the appeals are denied, however, the Region should not open and count the ballots. Specifically, Health Alliance of the Hudson Valley ("HealthAlliance") recently announced that it had signed a letter of intent to affiliate with Westchester Medical Center, pursuant to which Westchester Medical Center would become "the sole corporate member of HealthAlliance" and either Benedictine or Kingston Hospital would close. HealthAlliance's CEO has been quoted as saying the parties are working "as quickly as possible to finalize" the affiliation and that state funding needed to complete the process was expected to be known in April.

All of this calls into question the testimony of a HealthAlliance representative at the hearing in this case on December 8, 2014 that it was HealthAlliance's intent to use Nistel for the foreseeable future so as to avoid any disruption. It seems highly unlikely that the recent discussions that led to letter of intent were not already underway as of December 8. It is not unreasonable to suspect that HealthAlliance was trying to hide from the Region that on December 8, HealthAlliance was actively negotiating an affiliation with Westchester Medical Center that would lead to the closure of either Kingston or Benedictine Hospital, which HealthAlliance conceded would be disruptive *See* Transcript of December 8, 2014 at page 43. After all, the disruption caused by closing one of the two hospitals certainly undermines the articulated reason for Nistel's continuation – to avoid disruption – if a closing is imminent.

Ex. 1

Regardless whether HealthAlliance should have disclosed this information on December 8,[1] the transaction with Westchester Medical Center is clearly underway and HealthAlliance intends to act quickly. There is already record evidence that Nistel's continued existence presents problems for completing an affiliation. *See* Transcript of September 19, 2014 at 43-44.[2]

NYSNA asks that before opening any ballots, the Region re-open the record for the purposes of holding a hearing as to the status of HealthAlliance's affiliation with Westchester Medical Center and Nistel's continued status. Any such hearing, however, should await a decision on the appeals.

Thank you.

Very truly yours,

Joseph J. Vitale

Joseph J. Vitale

cc: Howard Estock, Attorney for
the Employer
Lisa Lydecker, Petitioner

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[1] HealthAlliance will no doubt argue that as of December 8 it was impossible to predict how its discussions with Westchester Medical Center would progress and/or that those discussions were confidential.

[2] On December 8, HealthAlliance's witness explained that since HealthAlliance has "not yet officially partnered with anyone," all discussions with possible affilates have been at the "20,000 foot level" without "delv[ing] into . . . the nuts and bolts" such as the savings to be realized through closing Nistel. *See* Transcript of December 8, 2014 at page 49. With the letter of intent now signed, Westchester Medical Center is no doubt delving into the issue of terminating the use of Nistel.

Exhibit D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

NISTEL, INC.

Employer

and **Case 03-RD-130926**

LISA LYDECKER

Petitioner

and

NEW YORK STATE NURSES ASSOCIATION

Union

ORDER SCHEDULING HEARING

On January 16, 2015, I issued an Order To Show Cause inviting any party to this proceeding to provide written cause of its legal position and argument as to whether extraordinary circumstances exist to warrant re-opening of the record. On January 30, 2015, the Union and the Employer submitted letters in response to the Order to Show Cause.

I have determined that the hearing be reopened for the limited purpose of taking additional testimony and evidence on the issue of whether the Employer now has imminent and certain plans to cease its operations as a result of the announcement, after the remand hearing closed and the Supplemental Decision issued, that Health Alliance, the Employer's sole customer, and Westchester Medical Center are engaged in merger discussions.

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is scheduled to commence on Friday, February 20, 2015 at 10:00 AM at the hearing room, 11A Clinton Ave Ste 342, Leo W O'Brien Fed Bldg, Albany, NY 12207-2350. The hearing will continue on consecutive days until concluded.

Dated: February 6, 2015

/s/RHONDA P. LEY

RHONDA P. LEY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465